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NO. 99-41

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

STATE OF WASHINGTON,

Petitioner,

v.

CHARLES B. FINCH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
WASHINGTON STATE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Brief in Opposition to Certiorari contains a number of misleading statements concerning the jury's knowledge of the restraints. Brief in Opposition at 7. The brief summarizes testimony that was rejected by the trial court, without mentioning that rejection.

At the remand hearing, the defense did introduce photographs purporting to show that the restraints were visible to the jury. The trial court discounted these as an accurate depiction of what the jurors could see. Remand tr. 151-52 (app. at 47-48). The jurors were seated when the defendant entered, while the photographs were taken from a standing position. Remand tr. 20, 29-30, 118. The photographs also show a person in an exaggerated posture that does not reflect

the way someone normally descends stairs. Remand tr. 151-52 (app. at 47-48).

The Brief cites the testimony of an ergonomist concerning the amount by which the defendant's stride was shortened. On cross-examination, this witness admitted that her calculations were based on an arbitrary estimate of the defendant's stride length. Remand tr. 62-63. The trial court discounted the witness's calculations. Remand tr. 21, 29, 150 (app. at 46-47).

Finally, the Brief mentions the testimony of defense trial counsel, that the defendant "kind of shuffle[d] along" when he wore the restraints. Remand tr. 96. The trial court rejected this testimony, which was contradicted by that of other witnesses. Remand tr. 21, 29, 150 (app. at 46-47).

II. REPLY TO RESPONDENT'S ARGUMENT

THE DECISION OF THE WASHINGTON SUPREME COURT CONTAINS NO PLAIN STATEMENT THAT IT RESTS ON INDEPENDENT STATE GROUNDS.

The Brief in Opposition claims that the Washington Supreme Court's decision rests on independent state grounds. The governing standard is set out in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983):

> [W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

A state court's citation to the state constitution is not sufficient to establish that the decision rests on independent state grounds. *Id.* at 1043.

Here, the state court's opinion cites to numerous Federal decisions and decisions from other states, as well as a few Washington decisions. *State v. Finch*, 137 Wn.2d 792, 842-54, 975 P.2d 967, 997-1003 (1999) (app. at 119-137); *id.* at 859-65, 975 P.2d at 1006-09 (app. at 144-53). Although the opinion contains a brief reference to the Washington constitution, there is no statement that the decision rests on independent state grounds. *Id.* at 843, 975 P.2d at 998 (app. at 120). Since the opinion interweaves discussion of Federal and state law, this court should presume that the Washington Supreme Court considered itself bound by Federal law.

III. CORRECTION TO APPENDIX

The appendix to the Petition for Certiorari, at page 158, erroneously lists Justice Johnson as signing the majority opinion. The list of justices should read:

GUY, C.J., and SMITH and ALEXANDER, JJ., concur.

As correctly stated on page 165, Justice Johnson signed the concurring opinion.

Respectfully submitted this ____ day of August, 1999.

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